True the beer is sent in the name of each member in care of the club, but it is not placed on special deposit but mingled with all the liquors on general deposit. The beer thereupon becomes club property just as a general deposit in a bank becomes the property of the bank. Each member can check on the club, and receive not his own beer but the quantity of beer for which he pays with his coupons, just exactly as a depositor checks money out of a bank. Though the beer was ordered in the member's name, yet it was shipped in care of the club, received by it and mixed with the club's other goods, and thus become the club's property subject to draft. The use of the member's name was merely colorable, not changing the true nature of the transaction. Had the beer been stolen, it must be charged in a bill of indictment, as the property of the club, or had a member broken into the club at night and regaled himself with the beer, he could not plead the beer was his any more than the depositor who breaks into a bank, and takes cash from the vaults could set up the plea, that he was merely closing his account. If an execution was issued against the club it could be levied on the beer. Instead of members paying cash, and receiving liquor in exchange, they simply paid in advance, receiving therefor coupons, which they cashed for liquor. Such a transaction, whether for profit or for loss, is clearly a sale.

Chief Justice Clark, in a dissenting opinion, pointed out that such devices to evade the law have been numerous and many of them ingenious, but if the law exempts liquor selling by social clubs, however respectable, by devices or "systems" however ingenious, it should permit it to all clubs without devices or "systems."

The expression in the Declaration of Independence "equal rights to all and special privileges to none," is not a figure of rhetoric but the truest expression of American sentiment. "Privilege and privileged class are and ought to be intolerable and it comes irritatingly near to a privilege when social clubs offering advantages of comfort and luxury, that are only open to the more prosperous, escape the prohibition of a statute because refined reasoning declares that by carrying out a "system" a sale is not effected, but merely a distribution of the common stock of liquor among its members, while the robust sense of the community, not excluding the club members themselves, knows the transaction to be a "sale."

C. S. H.

EFFECT OF THE SALE OF GOOD WILL.—Good will was first recognized some one hundred years ago[1] as a species of intangible property and an asset of a going business. A problem soon arose in the effect of transfer of the good will of a business as a restriction upon the vendor. There slipped into the law an admission that the vendor of the good will could, if he choose, set himself up in a similar business to that which he had sold out, provided it be

[1] Cruttwell v. Lye (1810), 17 Vesey, Jr., 335.

fairly and clearly a separate business. The *ratio decidendi* in these first cases was an inquiry whether the assignor of the good will made representations that the business which he had re-established was the same or a continuation of the old business. If it were found that he had made such representations, an injunction would be granted, by analogy, to the infringement of trade marks or trade names.[2]

At this time good will was regarded to be local and to attach particularly to the situs of the business. It is possible to see under this conception why the vendor was allowed to set up a new business, at least where not in or adjacent to the premises sold. It was soon recognized[3] that too much emphasis had been placed on the connection of the good will with the location and that the good will might be rather associated with the business itself[4] or with the business name,[5] or even with the personality of the business associates.[6] But the rule had become well established that the vendor could carry on a competing business, and some effect must be given to his voluntary act in assigning for a consideration the good will. Lord Romilly then and there took the stand[7] that such a vendor, although he might publicly advertise, was not entitled either by private letter or by a visit, or by his traveler or agent, to go to any person who was a customer of the old firm and solicit him not to continue his business with the old firm but to transfer it to him, the new firm. This restriction was extended in a case which even enjoined the vendor from dealing with the old customers,[8] it was overruled[9] and for ten years was disavowed; until in 1895 it was re-established in the House of Lords,[10] so that it may now fairly be said to be the law in England.

This rule which would allow the new business but restrain solicitation, has been adopted in a majority of jurisdictions in which the problem has arisen, notably Michigan,[11] New Jersey,[12] Pennsylvania,[13] Illinois,[14] and Rhode Island.[15] Other jurisdictions[16] have expressly refused to enjoin solicitation reflecting the uncertainty in England prior to the case in the House of Lords. Others have in

[2] Cruttwell v. Lye, *ubi supra,* citing Hogg v. Kirby, 8 Vesey, Jr., 215.
[3] Wood, V. C., in Churton v. Douglas, 5 Jurist N. S. 887.
[4] Brett v. Ebel, 51 N. Y. Sup. 573, mere control of all the trade with a certain port.
[5] Churton v. Douglas, *ubi supra.*
[6] Foss v. Roly, 195 Mass. 292.
[7] Labouchere v. Dawson (1872), L. R. 13 Eq. 322.
[8] Leggott v. Barrett (1880), 15 Ch. Div. 306.
[9] Pearson v. Pearson (1884), 27 Ch. Div. 145.
[10] Trego v. Hunt (1895), L. R. 1896 A. C. 7.
[11] Myers v. Kalamazoo Buggy Co., 54 Mich. 215.
[12] Newark Coal Co. v. Spangler, 54 N. J. Eq. 354.
[13] Wentzel v. Barbin, 189 Pa. 502.
[14] Rauft v. Reimers, 200 Ill. 386.
[15] Zanturjian v. Boornazian, 25 R. I. 151.
[16] Bergamini v. Bastian, 35 La. Ann. 60; Cottrell v. Babcock Mfg. Co., 54 Conn. 122; Vinall v. Hendricks, 33 Ind. Ap. 413; MacMartin v. Stevens, 37 Wash. 616.

dicta[17] disapproved the rule. The subject had never been discussed in a court of last resort in New York until the case of Von Bremen v. MacMonnies (1910), 200 N. Y. 41. In this the Court of Appeals overruled the previous holdings of the Appellate Division of the Supreme Court[18] and lined New York up with the jurisdictions avowing the English rule. The injunction restrained the defendants from soliciting the trade of the customers of the original firm and from dealing with such as had been already solicited. The right of the defendants to carry on a competing business was not denied. The court recognized the exception already made in England[19] in the case of compulsory alienation of good will, as in bankruptcy proceedings or by liquidation, where even solicitation is permitted. However the present assignment, although made a few weeks before the termination of the partnership as an alternative for liquidation, it was *held,* did not come within this exception, but must be regarded as voluntary.

The theory upon which all the cases are based, expressed as an implied covenant in the sale or an equitable principle, is, that the vendor has an obligation not to depreciate the value of what he has sold.[20] Now to engage in a similar business will certainly do this to a greater or lesser extent. Still more so, public advertisement, yet these are allowed the vendor. The line is only drawn when he begins to personally canvass the old customers. This is said to be an avowed endeavor to prevent the buyers of the good will receiving the benefit of it, or an attempt to disturb them in its enjoyment. Why is not keen competition equally such a violation? This seems, today as when it was first enunciated, a thoroughly arbitrary distinction.

Massachusetts has evolved an exceptional yet more logical rule.[21] Discovering the prior cases were reconcilable with the stand they were to take, her courts[22] disavowed the premise of the English rule, namely, that the seller had an unqualified right to engage at least in the same business. The effect of this voluntary assignment of the good will is, they say, to preclude him from setting up any competing business which will derogate from his grant. Whether the new business derogates from the good will which he has sold is a question of fact to be determined in each case. With this as a working rule injunctions will be granted[23] and good will will be

[17] White v. Trowbridge, 216 Pa. 11 and Farrand v. Williams, 88 Mich. 473.

[18] 138 App. Div. 319 and Ward v. Ward, 15 N. Y. Sup. 913; Cf. Close v. Flesher, 8 N. Y. Misc. 299.

[19] Walker v. Mottram, 19 Ch. Div. 355.

[20] Labouchere v. Dawson, *ubi supra.*

[21] Hutchinson v. Nay, 187 Mass. 262.

[22] Old Corner Book Store v. Upham, 194 Mass. 101; Marshall Co. v. New Marshall Co. (1909), 203 Mass. 410, and cases cited therein.

[23] In Old Corner Book Store v. Upham, *supra,* and in Foss v. Roby, 195 Mass. 292, the vendors were enjoined from engaging in business in the city wherein the former business was conducted. If the business were world-wide, cf. Nordenfelt v. Gun Co. (1894), A. C. 535, under the Massachusetts rule he could not have set up a similar business. *Quaere,* would that not be the result in the case of Von Bremen v. MacMonnies, *supra,* where the business was national in scope?

recognized as a valuable asset[24] where it would be impossible under the English rule. The recognition of good will is of comparatively recent origin, it has been seen, and the number of cases involving it is increasing. Those jurisdictions which choose to follow the English rule must logically accept the final word in Trego v. Hunt. On the other hand, they may choose the stricter Massachusetts rule based on a logical test adapted to each case and prefer it to a rule based on an arbitrary distinction.[25]

S. L. H.

MUNICIPAL LIABILITY TO INDIVIDUALS FOR NONFEASANCE IN THE OPERATION OF PARKS.—Given a tract of land bordering on a body of water which is devoted to the amusement and recreation of the public, and to which end there is located thereon profit producing facilities in the form of piers, pavilions, bathhouses, refreshment stands, boat landings, and walks and drives and an open, unoccupied area where the grass is kept green for the pleasure of visitors and over which visitors are permitted to walk. A dangerous condition exists on such open, unoccupied area by reason of the admitted negligence of the person in whom the duty and means to remedy it resides. No admission fee is exacted of any one who enters this park, but an opportunity to spend his money is offered him at the piers, refreshment stands, etc., to the indirect profit of the person who owns the park. A woman who is rightfully in the park and walking in this open area is, without any contributory negligence on her part, injured by coming in contact with the dangerous condition. If the owner of the park happens to be a private individual or private corporation and it was the neglect of his or its manager which caused the injury, there can be no doubt that the rule of *respondeat superior* would apply and such private owner would be held answerable to the injured party in damages. But if, under the same conditions, the owner happens to be a municipal corporation and the negligent manager is the incumbent of an office of the city created by law to exercise supervision and control over parks, the same injured party is left without remedy under the rule of the recent case of Bisbing v. City of Asbury Park.[1] In its last analysis that case seems to make the right of an individual who has thus been injured to a remedy to depend upon whether the profits from the park go into the pocket of private persons or into the treasury of a city. It is submitted that such a conclusion does violence both to the rights of the individual and to the principles upon which municipal exemption from liability is founded.

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[24] Gordon v. Knott, 199 Mass. 173.

[25] The Pennsylvania case, Wetzel v. Barbin, *ubi supra*, decided on its merits without any reference to precedent is equally reconcilable with either rule. The injunction restraining the new business, a newspaper route, was practically co-extensive with an injunction restraining solicitation.

[1] 78 Atl. 196 (1910).